IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, and 79-491

****

JASPER F. WILLIAMS and EUGENE G. DIAMOND, *Appellants*

—v.—

DAVID ZBARAZ *et al.*

JEFFREY C. MILLER, Acting Director,
Illinois Department of Public Aid, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

UNITED STATES OF AMERICA, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

****

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Brief of JANE ROE *et al.*; JOHN FRANKLIN, M.D. *et al.*; and PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, WOMEN'S HEALTH SERVICES, and PHILADELPHIA WELFARE RIGHTS ORGANIZATION, Pennsylvania not-for-profit corporations, as *AMICI CURIAE*

PAUL BENDER
THOMAS HARVEY
260 South 15th Street
Philadelphia, PA 19102

KATHRYN KOLBERT
SUSAN CARY NICHOLAS
112 South 16th Street
Philadelphia, PA 19102

SHERI FRIEDMAN
ROLAND MORRIS
100 South Broad Street
Philadelphia, PA 19110

Attorneys for *Amici Curiae*

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INTEREST OF THE AMICI CURIAE

This brief of plaintiffs in Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) as Amici Curiae in support of the appellees is submitted with the written consent of all the parties. The consents have been filed with the Clerk of the Court.

Plaintiffs in Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) include the class of all pregnant or potentially pregnant women who are eligible for medical assistance under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 et seq., for whom abortions are medically necessary, although not necessary to save their lives, and who have been or will be prevented or impeded in obtaining therapeutic abortions because of Public Acts 16A and 148 of 1978.

In addition, plaintiffs include the class of all licensed physicians in Pennsylvania who are entitled to obtain reimbursement for necessary medical services

rendered to, and to perform medically necessary abortions for, persons eligible for medical services under the Pennsylvania Medical Assitance Program, 62 P.S. §441.1 et seq., and who would be denied reimbursement because of the enactment of Acts 16A and 148. Plaintiffs also include health care providers, who would be denied reimbursement for medically necessary abortions because of Acts 16A and 148.

The interest of the plaintiffs in Roe v. Casey, arises from the fact that they are parties to a case presently pending in the Court of Appeals for the Third Circuit, regarding reimbursement for medically necessary abortions.

The brief which Amicus curiae is requesting permission to file will contain a more complete argument on the statutory interpretation of "Medicaid" and whether or not the Hyde Amendment is a substantive amendment to the "Medicaid" statute. If

the argument is accepted, it would be dispositive of this case.

SUMMARY OF ARGUMENT

Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq., requires states which participate in the Medicaid program to reimburse certain medical services performed on eligible recipients. HEW regulations implementing the Medicaid program prohibit states from "arbitrarily deny[ing] or reduc[ing] the amount, duration or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition." 42 C.F.R. §440.230 (1979). State laws, such as the Illinois law at issue in the present case, which attempt to deny funding for abortions except when the abortion is necessary to save the pregnant woman's life, violate that regulation by arbitrarily discriminating against medically necessary abortions solely upon the basis of the diagnosis, type of illness or condition involved. Hodgson v. Board of County Commissioners, No. 79-1665 (8th Cir. Jan. 9, 1980); Preterm v.

Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, ___U.S.__, 99 S. Ct. 2181 (1979); Doe v. Kenley, 584 F.2d 1362 (1978).

The federal appropriations measure commonly known as the Hyde Amendment had no effect upon the states' Title XIX obligations. As the Hyde Amendment itself states, the provision merely restricted the disbursement of federal funds for abortions. Absent a clear statement of congressional intention to the contrary - which is not found in the Hyde Amendment - this Court has repeatedly held that appropriations riders must be construed to avoid substantive results. United States v. Mitchell, 109 U.S. 46 (1883); Langston v. United States, 118 U.S. 389 (1886); TVA v. Hill, 437 U.S. 153 (1978).

Congressional rules similarly prohibit changes in substantive law by means of an appropriations rider. Senate Rule 16.4; House Rule XXI(2). While those Rules may be deliberately waived in particular circumstances, no waiver occurred in connection

with the passage of the Hyde Amendment.

The legislative history of the Hyde Amendment also supports the conclusion that Congress did not alter the states' obligations to fund all medically necessary abortions. See, e.g., Congressman's Hyde's summation of his position at 123 Cong. Rec. H10830 (daily edit., Oct. 12, 1977); and remarks by Congressmen Edwards and Dornan at 123 Cong. Rec. H6090 and H6086, respectively.

Since Congress has left the states' Title XIX obligations intact, it is not proper for the courts to change those obligations. See, e.g., TVA v. Hill, supra, 437 U.S. at 191 and Justice McManus' opinion in Hodgson v. Board of County Commissioners, supra, slip opin. at 27, 28 (dissenting).

HEW regulations interpreting the Hyde Amendment buttress the conclusion that the Amendment affected only funding. 42 C.F.R. §§ 50.304, 50.305, 50.306, 50.307, 50.308. Whether or not the states are required to fund abortions is a "separate question" [43 Fed. Reg. 31875, July 21, 1978], to be resolved in light of the substantive

provisions of Title XIX and its implementing regulations.

The cut-off of federal funds for abortions except in certain narrowly-prescribed situations does not, of course, automatically relieve states from their obligation to fund services mandated by the Medicaid statute. While Medicaid is a program of cooperative federalism, federal financial participation in every service necessarily provided by a participating state is not required. Doe v. Busbee, 471 F. Supp. 1326, 1333 (N.S. Ga. 1979). Federal financial participation in Medicaid is computed as a percentage of the total state expenditure, and not on an item for item basis. 42 U.S.C. § 1396d(b).

ARGUMENT

I. THE COURT CAN DECIDE THIS CASE ON STATUTORY GROUNDS THROUGH THE APPLICATION OF WELL-SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION AND AVOID THE RESOLUTION OF SERIOUS CONSTITUTIONAL QUESTIONS

We urge the Court to resolve this case on statutory grounds, thereby making it unnecessary to reach the difficult constitutional questions which the case presents. We contend that the Illinois statute at issue here, which severely restricts Medicaid funding for medically necessary (therapeutic) abortions, conflicts with the overriding provisions of Title XIX of the Social Security Act [hereinafter cited as "Title XIX" or "Medicaid"][1]. Therefore, the Illinois statute is invalid

[1] Illinois P.A. 80-1091 limits abortion funding to procedures "necessary for the preservation of the life of the woman seeking such treatment . . . ." Ill. Rev. Stat. ch. 23 § § 5-5, 6-1, 7-1 (Supp. 1979). The court of appeals held that Illinois is required to fund all Medicaid abortions for which federal matching funds are available. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979). This holding constitutes a judicial redrafting of the Illinois statute to track the language of the Hyde Amendment. The propriety of that judicial decision is irrelevant to our position. Because we contend that Illinois is obliged by Title XIX to fund all medically necessary abortions, both the version of the Illinois statute enacted by the Illinois legislature and the version created by the court of appeals impermissibly restrict Medicaid funding for abortions.

under the Supremacy Clause of the Constitution which provides that when state law conflicts with federal law, the federal law prevails.

Part of this brief explains why we ask the Court to accept the constructions of Title XIX and the Hyde Amendment which are discussed in Parts II-IV.[2] The statutory constructions we advocate are supported by fundamental principles of statutory construction and would allow the Court to avoid the difficult constitutional questions with which it would otherwise be confronted. Part II of the brief discusses the provisions of Title XIX which oblige the states participating in Medicaid to pay for medically necessary abortions. We contend in Parts III and IV that the federal appropriations legislation known as the Hyde

(2) The Hyde Amendment was attached as a rider to the annual HEW appropriations legislation for the last 4 years. The version of the Hyde Amendment most applicable to this litigation provided that appropriated federal funds may be used to perform abortions in only three situations: (1) where the life of the pregnant woman is endangered, (2) where the woman is a victim of rape or incest, or (3) where childbirth would cause severe and long-lasting physical health damage to the woman. 91 Stat. 1460 (1977) and 92 Stat. 1586 (1978).

Amendment did not alter the states' duty to fund therapeutic abortions under Medicaid. Thus, the Illinois statute which engendered this litigation is pre-empted by federal law and invalid under the Supremacy Clause.

The court of appeals in this case held that the Hyde Amendment impliedly repealed state obligations under Title XIX to fund Medicaid abortions and remanded the case to the district court to consider the constitutionality of the Hyde Amendment. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979). The district court held that the Hyde Amendment, construed as a substantive alteration of Title XIX, was unconstitutional. Zbaraz v. Quern, 496 F. Supp. 1212 (W.D. Ill. 1979). Recently, another district court reached the same conclusion in McRae v. Califano, 76 C 1804 (S.D.N.Y., Jan. 15, 1980). See also, Reproductive Health Services v. Freeman, ___F.2d ___ (8th Cir. 1980) (Nos. 79-1275 and 79-1346), (state anti-abortion subsidy statute interpreted to parallel Hyde Amendment ruled unconstitutional); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979) cert. denied 99 S.Ct. 2181 (1979) remanded to district court to determine the constitutionality of

state statute construed to parallel Hyde Amendment).

The present case and the other cases cited above raise substantial and difficult constitutional issues — issues that are neither addressed nor settled by this Court's existing abortion funding decisions in Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); and Poelker v. Doe, 432 U.S. 519 (1977). If the Hyde Amendment is read to repeal state obligations under Title XIX, this Court will have to address the merits of difficult constitutional questions under the fundamental rights and rationality branches of the Equal Protection Clause, as well as issues under the First Amendment. We advocate a narrow construction of the effect of the Hyde Amendment, a construction which would avoid the constitutional issues in this case.

When two or more interpretations of a federal statute are fairly available, due regard for the proper role of the federal courts in our constitutional system demands the adoption of the statutory

interpretation which will avoid serious constitutional questions. Thus, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Lorillard v. Pons, 434 U.S. 575, 577 (1978) and United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971), both quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). See also, Justice Brandeis' well-known formulation in his concurring opinion in Ashwander v. T.V.A., 297 U.S. 288, 346-48 (1936). And, more recently, see, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

As we will demonstrate in Part III, a construction of the Hyde Amendment that will avoid serious constitutional questions is more than "fairly possible". Such an interpretation is indeed required by the plain language of the statute,

by long-standing doctrines regarding the construction of federal appropriations legislation, by the explicit rules of both Houses of Congress, by a fair reading of the entire legislative history, and by the authoritative interpretative regulations of the federal agency charged with administering the Amendment. It would be difficult to imagine a more compelling case for application of the fundamental interpretative doctrine that difficult constitutional questions should not be confronted unnecessarily.

If the Hyde Amendment is construed as a withdrawal of federal funding which does not effect the existing obligations of the states participating in Medicaid to fund therapeutic abortions, the Court can decide the present case on the grounds that Illinois P.A. 80-1091 is inconsistent with Title XIX and therefore invalid under the Supremacy Clause of the Constitution. Although technically "constitutional," a claim

that a state statute or regulation is pre-empted by federal law is treated as a statutory ground for purposes of avoiding unnecessary resolution of constitutional questions. In Hagans v. Lavine, this Court explained:

> [W]here . . . the pendent claim, although denominated "statutory," is in reality a constitutional claim arising under the Supremacy Clause, . . . the Court has characteristically dealt with the "statutory" claim first "because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues.

415 U.S. 528, 549 (1973).

Illustrative of this approach is Dandridge v. Williams, 397 U.S. 471 (1970) in which a state regulation was challenged on two grounds, because it conflicted with a federal statute and because it violated the Fourteenth Amendment's guarantee of equal protection. The Court began its analysis with the statutory (Supremacy Clause) issue "because if the appellee's position on this question is correct, there is no occasion to reach

the constitutional issues." Id. at 476.(3) We urge a similar course upon the Court in this case. The remainder of this brief will demonstrate why the Court should apply settled principles of statutory construction recently affirmed in T.V.A. v. Hill, 437 U.S. 153 (1978), construe the Hyde Amendment as legislation affecting only the expenditure of federal funds, and hold that Illinois P.A. 80-1091 is inconsistent with Title XIX of the Social Security Act.

(3) See also, Leroy v. Great Western United Corp., 99 S.Ct. 2710, 2720-21 (1979) (White, J., dissenting) Edelman v. Jordan, 415 U.S. 651, 675 (1974); King v. Smith, 392 U.S. 309, 312 n. 3 (1968).

II. TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES FUNDING OF MEDICALLY NECESSARY ABORTIONS

Title XIX of the Social Security Act was enacted in 1965 to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. § 1396 (emphasis added). Medicaid is a program of cooperative federalism. If a state chooses to participate, to be eligible for federal reimbursement, it must comply with the minimum requirements of state Medicaid programs set by federal law. Title XIX requires that a qualifying state plan must reimburse certain medical services to those who are eligible for welfare under the federal categorical assistance program (the "categorically needy"). 42 U.S.C. § 1396(a)(10). These services include: "inpatient hospital services, outpatiant hospital services, other laboratory and X-ray services . . . and physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere." 42 U.S.C.

§§ 1396a(a)(13)(c), 1396(d). Standard abortion procedures necessarily involve most, if not all, of these types or classes of service mandated by Medicaid.

States may, at their discretion, enlarge the scope of their programs and provide Medicaid to poor people whose incomes are too high provided they satisfy the other requirements for categorical federal assistance (the "medically needy"). 42 U.S.C. § 1396a(a)(10)(c). Of course, each state must develop "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX[." (4) 42 U.S.C. § 1396(a)(17).

(4) The legislative history of Title XIX indicates that the "reasonable standards" language was intended to allow the states some flexibility in determining the coverage of their plans with respect to optional recipients of medical assistance. See S. Rep. No. 404, 89th Cong., 1st Sess. 77, 79, 81 (1965); H. R. Rep. No. 213, 89th Cong. 1st Sess. 67, 69, 71 (1965. Because the purpose of the Act is to provide "necessary medical services" (42 U.S.C. § 1306), HEW has allowed the states to place reasonable limitations on the "extent" of coverage (e.g., the number of days inpatient hospital services) but the Act as interpreted does not authorize the states to eliminate coverage of a particular kind of medically necessary care. 42 C.F.R. 440.230; Beal v. Doe, 432 U.S. 438 (1977).

One such objective is that the provision of services must be in the "best interests of the recipients." 42 U.S.C. § 1396a(a)(19); 45 C.F.R. § 206.10(a)(11) (1978).

The constraints imposed on the states participating in Medicaid are explained further in 42 U.S.C. § 1396a(a)(10) which requires that the services available to any categorically needy recipient "shall not be less in amount, duration, or scope than the medical assistance made available to any other such recipient. . . ." General HEW regulations provide a more precise interpretation of § 1396a(a)(10). The regulations impose on state plans the following requirements (42 C.F.R. § 440.230 (1979):

> (a) The plan must specify the amount and duration of each service that it provides.
>
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

> (c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
>
> (2) The agency may place appropiate limits on a service based on such criteria as medical necessity or on utilization control procedures. (emphasis added(5)

This bar against exclusion from Medicaid coverage based on "diagnosis, type of illness or condition" is fundamental to the Medicaid program and to the litigation at hand.

Against this federal statutory and regulatory framework, Illinois adopted P.A. 80-1091 which limits abortion funding to procedures "necessary

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(5) The regulations cited here have been promulgated by HEW, the agency charged with implementation of the provisions of Title XIX. Their validity is unchallenged and they must be presumed to have the "force and effect of law." Chrysler Corp. v. Brown, ___U.S.___, 99 S.Ct. 1705, 1714 (1979).

for the preservation of the life of the woman seeking such treatment . . . ." Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1979). The United States Court of Appeals for the Seventh Circuit held that the Illinois statute, standing by itself, was invalid under Title XIX. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979); on remand, 496 F. Supp. 1212 (N.D. Ill. 1979) (appeal pending sub nom. Zbaraz v. Miller). The Seventh Circuit explained that "limiting Medicaid assistance to life-threatening abortions 'violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion.'" 596 F.2d at 199 (quoting from Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979)). Were it not for the Hyde Amendment which the court of appeals held amended the provisions of Title XIX, "the states would be obligated to provide for medically necessary abortions for which federal funds would not be available." Id. See Part III, infra, for discussion

of Hyde Amendment.

Three other circuit courts have unanimously found similar state enactments to violate Title XIX.[6] As the First Circuit stated:

> When a state singles out one particular medical condition - here, a medically complicated pregnancy . . . it has, we believe, crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition.

Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979), cert. denied, 99 S.Ct. 2181 (1979). Most recently, the Eighth Circuit explained that:

> [T]he basic criterion is the financially eligible recipient's degree of medical need. The infirmity of the Minnesota scheme is that it subsidizes health-sustaining services generally, including pregnancy-related services, but subsidizes abortions only if they are life-sustaining. This policy denies service solely on the basis of diagnosis or condition, and does so arbitrarily because the denial is not in accordance with a uniform standard of medical need.

Hodgson v. Board of County Commissioners, No. 79-1665 slip op. at 10 (8th Cir. 1979).[6] The Fourth Circuit has also affirmed that medically necessary abortions must be included in state medical assistance plans. Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

(5) These rulings echo the warnings of the U.S. Supreme Court in Beal v. Doe, 432 U.S. 436 (1977), which upheld Pennsylvania's exclusion of non-therapeutic abortions from its medicaid program. Pointing to the definition of a "necessary" abortion set out in Doe v. Bolton, 410 U.S. 179, 192 (1973) (necessary in light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient) the Court cautioned that "serious statutory questions might be presented if a state medical plan excluded necessary medical treatment from its coverage." 432 U.S. at 444-45 and n. 3.

(6) The Eighth Circuit noted that the states may have some discretion under Title XIX -- for financial reasons -- to determine the scope of services they will provide within the broad category of "medically necessary" services. The scope, however, must accord with the objectives of Title XIX including the provision of medical services on an even-handed basis and in the eligible recipient's best interests. See Hodgson, slip op. at 12.

District courts and state courts have virtually unanimously joined the circuits in enjoining funding restrictions similar to Illinois P.A. 80-1091. In Roe v. Casey, the district court held that the Pennsylvania statutes which limit abortion funding to life-saving situations "arbitrarily discriminate against medically necessary abortions on the basis of the diagnosis, type of illness or condition involved, in violation of the objective and requirements of Title XIX and its implementing regulations." 464 F. Supp. 487, 500 (E.D. Pa. 1978) (appeal pending). See also, Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Freiman v. Walsh, No. 77-4161-CV-C (W.D. Mo., Jan. 26, 1979), aff'd sub nom. in relevant part, Reproductive Health Services v. Freeman, ___F.2d___(8th Cir. 1979) (Nos. 79-1275, 79-1346); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977); Smith v. Ginsberg, No. 75-0380 CH

(S.D. W. Va. May 9, 1978); Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. Ct. Ch. Div. 1979).

Only one federal court has approved a state effort to deny Medicaid payments for all but life-saving abortions. D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978). D.R. v. Mitchell, relying on anti-abortion statutes which were ruled unconstitutional eight years after the enactment of Title XIX, holds that "medically necessary" abortions are those which were legal when Title XIX was first enacted. Such static analysis contradicts the Medicaid statute, its legislative history and its regulations and has been accorded little respect in subsequent cases. As the First Circuit recognized, the Utah decision is unsupportable:

> [D.R. v. Mitchell] gives only cursory analysis to the statutory claims and nowhere directly addresses the meaning of the accompanying HEW regulations. Therefore, defendant's reliance on that case is misplaced.

Preterm v. Dukakis, Civ. Action #78-1673 (D.Mass. July 28, 1978), slip op. at 11; aff'd, 591 F.2d 121 (1st

Cir. 1979). Likewise, the Eighth Circuit noted that the analysis in D.R. v. Mitchell "leads to the absurd result that Title XIX permits a participating state to withhold subsidies for any service, no matter how medically necessary, that was not legally available in 1965. [This] would contravene Title XIX's express directive that standards governing the extent of medical assistance be reasonable. Reproductive Health Services v. Freeman, slip op. at 9 (8th Cir. 1980) (citing 42 U.S.C. § 1396a)(a)(17)).

Title XIX requires compliance with the prohibition against discrimination based on illness, diagnosis or condition. Outside the abortion context, this "non-discrimination" principle has been widely upheld by courts faced with state restrictions on Medicaid services. In White v. Beal, the Third Circuit held that 42 U.S.C. § 1396a(a)(17) and 1396(a)(10) of Title XIX require that the financial pressures upon a state be met with "an equitable distribution of the total funds available among all in need of the service."

555 F.2d 1146, 1150 (3d Cir. 1977) (impermissible to only subsidize eyeglasses when poor vision is result of eye disease). See also, PWRO v. Shapp, C.A. 78-2353 (3d. Cir. July 9, 1979) (medically necessary orthodontic care required under Title XIX). Similarly in Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977), a federal district court invalidated a plan to limit reimbursement for drugs to those specified in a drug formulary and those additional drugs for which a physician obtained prior approval. The court found that even though 90% of the drugs needed would be covered, not all Medicaid beneficiaries would receive "the scope and quality of services necessary to achieve the prescription drug component's purpose of curing, mitigating or preventing disease or for the maintenance of health as required by 45 C.F.R. § 249.10(b)(12)(i)." Id. at 108.

In Rush v. Parham, 440 F. Supp. 383 (D. Ga. 1977), the district court held that federal law prohibited the state from denying reimbursement for necessary

transsexual surgery on the basis of diagnosis. The Minnesota Supreme Court reached the same result. Doe v. State, ____ Minn. ____, 257 N.W. 2d 816 (1977). An Iowa district court which ordered that state to provide reimbursement for transsexual surgery which was certified by a physician as medically necessary explained that:

> The statutory mandate of the Title XIX Medicaid Program leaves no discretion to participating states in the provision of medically necessary services. In any program of cooperative federalism, states which choose to participate in the program must comply with certain statutory requirements as a condition to this participation and to federal financial assistance. Once the determination is made that an applicant requires necessary medical treatment, a person eligible for Title XIX assistance cannot be denied coverage by a state plan. Medical necessity is to be determined with reference to the same factors which might have dictated a decision on the part of a professional in the field to recommend such treatment for an individual. Thus necessity is considered in terms of individual need and cannot be based upon the type of operation. This court agrees with the conclusion that the issue of medical necessity is one to be left entirely to the patient's physician.

Pinneke v. Preisser, 47 U.S.L.W. 2790 (N.D. Iowa,

May 11, 1979). See also Curtis v. Page, C.A. No. 78-073 (N.D. Fla., April 18, 1979) (striking down a limitation for doctor's visits in excess of three (3) per month); Fabula v. Buck, 47 U.S.L.W. 2789 (4th Cir., May 21, 1979) (invalidating a state limitation on medical assistance eligibility.)(7)

As the long line of cases dealing with the issues before this Court amply demonstrates, the Social Security Act prohibits states from denying Medicaid coverage on the basis of diagnosis or condition, and requires that states allow payment for all services included in the program which are certified as medically necessary by

(7) In a few exceptional cases states have been permitted to deny reimbursement for certain services on the grounds that the relevant federal statute had expressly labeled such services as optional. See, e.g., Quern v. Mandley, 436 U.S. 725 (1978) (Emergency Assistance under Title IV of the Social Security Act); Budnicki v. Beal, 450 F. Supp. 546 (E.D. Pa. 1978) (orthopedic shoes). Neither case erodes the proposition that states must conform to the mandatory provisions of the Social Security Act.

(8)
by the attending physician. This principle applies to abortion services as fully as it applies to all other medical services.

The Solicitor General agrees that Title XIX, standing alone, requires participating states to fund medically necessary abortions. See U.S. Brief at ____. He relies on the legislative history of Medicaid which indicates that Congress intended to require the states to pay for certain categories of services and the Secretary of HEW's view that the states must fund medically necessary care within the statutory categories. Id. Thus, the Solicitor

(8) This Court has emphasized that the question of when an abortion is appropriate is an individual medical issue to be resolved by the woman with the professional help of her physician. Colautti v. Franklin, 439 U.S. 379 (1978). Indeed, Title XIX explicitly relegates the decision about when a procedure is medically necessary to the professional judgment of the physician. Medicaid payments are available "only when and to the extent" the services are "medically necessary as determined in the exercise of reasonable limits of professional discretion." 42 U.S.C. § 1302c(1).

General concludes, as we do, that:

> The statute and [HEW] regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (i.e, that an abortion is medically necessary) and condition (i.e., pregnancy). Id.

The Illinois statute at issue here prohibits payment for medically necessary abortions, a clear violation of the provisions of Title XIX.

III. THE HYDE AMENDMENT DOES NOT ALTER ILLINOIS' OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

As shown in Part II of this brief, Title XIX of the Social Security Act and its implementing regulations require states that participate in the Medicaid program to fund medically necessary procedures, including abortions. The Illinois legislation challenged in this case plainly conflicts with this Title XIX obligation.

In the present case, the United States Court of Appeals for the Seventh Circuit found that the Hyde Amendment, although enacted as an appropriations measure, worked an implied substantive alteration on state plan requirements under Title XIX. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979).(9) We submit that the Hyde

(9) Two other courts of appeals and a district court have recently held, contrary to our position, that the Hyde Amendment had the effect of altering state obligations to fund abortions under Title XIX. Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979) (2-1 decision); Hodgson v. Board of County Commissioners, ___ F.2d ___ (8th Cir. 1979) (No. 79-1665) (2-1 decision); McRae v. Califano, 76 C 1805 (S.D.N.Y. January 15, 1980). For the reasons stated in Part III of this brief, we submit that these decisions are clearly erroneous for failing to follow established rules of statutory construction. See Judge Bowne's convincing dissent in Preterm and Judge McManus' dissent in Hodgson.

Amendment does not validate the Illinois legislation at issue here because the Hyde Amendment, as explicit and unambiguous federal appropriations legislation, did not have the effect of changing existing substantive obligations under federal law.

A. The unambiguous language of the Hyde Amendment requires the conclusion that its only effect is to restrict the disbursement of federal funds.

The Hyde Amendment added the following limiting language to the 1978 HEW Appropriations Act, which appropriates "such amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, & Welfare and Related Agencies Appropriations Act . . . ."

> Provided, that none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

> Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.
>
> The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

P.L. 95-205, § 209, 91 Stat. 1460 (1977).[10]

The provision states that "none of the funds provided for in this paragraph shall be used to perform abortions." The only funds "provided for" by Section 101 are the federal funds appropriated in the language immediately preceding the Amendment. On its face, this language limits only the disbursement of federal funds. There is no reference whatever to state payments, nor are there any words that modify the existing obligations of states under Title XIX.

(10) The same language was repeated in the Hyde Amendment adopted for fiscal year 1979. 92 Stat. 1586. The 1980 version of the Hyde Amendment eliminates the funding in situations where childbirth would cause severe and long-lasting physical health damage to the woman. 93 Stat. 925, 926.

If Congress wished to alter the states' obligations under Medicaid, it could easily have done so in substantive legislation (which might have provided, for example, that "notwithstanding the provisions of Title XIX no state shall be required to provide funds to perform abortions except . . . . ")[11] Yet the Hyde Amendment, obviously an appropriations rather than a substantive measure, refers unambiguously to the federal funding component alone. When legislative language is this clear, it must be given its evident significance. See, e.g., Cole v. Harris, 571 F.2d 590, 597 (D.C. Cir. 1977); United States v. United States Steel Corp., 482 F.2d 439, 441 (7th Cir. 1973); Glover Construction Co. v. Andrus, 451 F. Supp. 1102 (E.D. Okla. 1978), citing United States v. Missouri Pacific Railroad, 278 U.S. 269, 277-278 (1929).

(11) Legislation is currently pending in Congress which would amend Title XIX to eliminate the requirement that the states fund medically necessary abortions. See Cong. Rec. H11770 (daily ed. Dec. 11, 1979) (abortion amendment contained in proposed Child Health Assurance Act of 1979).

Congress' evident desire in enacting the Hyde Amendment — a desire that flowed, no doubt, from the highly charged nationwide debate over the abortion issue — was simply to dissociate direct federal funding from the heated controversy. Changing the substantive rights of needy Medicaid recipients to medically necessary procedures would have been a very significant additional step for Congress to take, a step that would have implicated a number of additional considerations and that would have required substantive legislation, rather than a proviso to an apropriations bill. Congress did not choose to enact such substantive legislation and there is no warrant for giving its appropriations proviso a substantive effect that the language does not suggest or support.

B. Established precedent creates a strong presumption against construing appropriations legislation to make substantive changes in existing law.

The traditional limitations on looking behind unambiguous statutory language are significantly reinforced in this case by doctrines of interpretation specially applicable to appropriations legislation. These doctrines, which reflect the realities of the federal appropriations process, create a general presumption against construing federal appropriations bills to repeal existing substantive law. Thus, even if the language of the Hyde Amendment was seriously ambiguous with respect to existing state obligations under Title XIX, these rules of construction strongly counsel that the ambiguity be resolved against a repeal of Title XIX obligations.

In a series of cases beginning with United States v. Mitchell, 109 U.S. 146, 150 (1883), this Court has repeatedly held that appropriations riders must be construed to avoid a substantive result unless the congressional language clearly states otherwise.

In Mitchell, the Court first articulated the rule that the intention of Congress to alter pre-existing legislation through the appropriations process must be "plain on the face of the statute." Subsequently, in Langston v. United States, 118 U.S. 389, 393 (1886), the Court elaborated: "If by any reasonable construction they [the pre-existing substantive legislation and the appropriations rider] can be made to stand together our duty is to give effect to the provisions of each." Repeal by implication is disfavored such that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancari, 417 U.S. 535, 550 (1974).

As noted above, it is clearly possible to construe the Hyde Amendment so as to create no conflict with Title XIX, by simply reading the Amendment as it is written — to withhold federal funds for certain abortions, but to leave standing the clear Title XIX obligations of the states that join the Medicaid

program.

The duty of the courts to construe appropriations legislation, whenever possible, to avoid repeal of substantive legislation was recently underscored by this Court in language directly applicable to the present case:

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." . . . This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act. (emphasis in original)
>
> (12)

T.V.A. v. Hill, 437 U.S. 153, 190 (1978)

(12) Although in T.V.A. v. Hill the doctrine disfavoring repeal by implication through appropriations acts was applied to a positive appropriations measure, the rule has also been applied in situations like the present where the appropriations measure is a limitation of funds for an authorized program. See, e.g., U.S. v. Vulte, 233 U.S. 509 (1914); U.S. v. Langston, 118 U.S. 389 (1886); N.Y. Airways v. U.S., 369 F.2d 743 (Ct. Cl. 1966); Gibney v. U.S. 114 Ct. Cl. 38 (1949); Taylor v. Kjaer, 171 F.2d 343 (D.C. Cir. 1948); NLRB v. Thompson Products, Inc. 141 F.2d 794 (1944).

The greater reluctance of the courts to find an implied repeal of prior substantive law because of a subsequent appropriations statute stems from the distinct character of appropriations measures and the manner in which they are enacted by Congress. This Court explained the distinction in T.V.A. v. Hill:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any forbidden purpose. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.

437 U.S. at 190.

The Hyde Amendment was attached as a rider to an appropriations bill after the bill was reported out of committee. Although the debates on the amendment were

lengthy, no committee hearings were ever held, no methodical assessment of the legislation was ever undertaken. In evaluating the legislative history of the Hyde Amendment, one district court observed:

> [L]egislative debates are perhaps the least reliable of enactment materials which can be used in interpreting statutes . . . . [C]ommittee and conference reports are much more productive legislative materials . . . . No such conference or committee reports exist for the Hyde Amendment. It is unduly naive to expect that most Congressmen attend such floor debates . . . and it should be noted that the reports of those debates are permitted to be edited by the speakers.

Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529, 539 (S.D. Ohio 1979).

Another reason why the rule disfavoring repeals by implication is stringently applied when the alleged repealer is an appropriations measure is the temporary nature of appropriations acts. If the legislation with one year duration is deemed to amend on-going substantive legislation, what happens at the end of a year's time when the repealing act expires? Although Congress re-enacted a version of the original Hyde Amendment

in each of the next three years, the text of the amendment has changed substantially twice.[13] The dissent in Hodgson v. Board of County Commissioners elaborated on the special problems inherent in repeal through temporary appropriations legislation:

> [Hyde] is, and has been, subject to yearly change. . . . [G]iven the current political winds emanating from the abortion storm one can easily envision future design changes. An expansive construction of Hyde would not only undermine the on-going stability of Medicaid but would also embroil this and other courts in reviewing such claimed amendments, year after year. (emphasis in original)

(13) The version of the Hyde Amendment applicable to fiscal year 1977 limited federal funding to situations where the mother's life would be endangered without an abortion. 90 Stat. 1434 (1976). The version enacted for fiscal years 1978 and 1979 allowed federal funding in two additional situations: promptly reported cases of rapes or incest, and cases where childbirth would cause severe physical health damage. 91 Stat. 1460 (1977); 92 Stat. 1586 (1978). The 1980 version eliminated the federal funding for cases where childbirth would cause severe physical health damage. 93 Stat. 925, 926.

Slip op. at 27 (8th Cir. 1979) (No. 79-1665).

To hold that the Hyde Amendment by implication changes the substantive obligations of the states participating in Medicaid subjects the states to the annual uncertainty of federal appropriations, invites litigation, and injects administrative problems into the state Medicaid plans.[14]

C. The express rule of both Houses of Congress bolster the presumption against construing an appropriations measure to alter prior substantive legislation.

Current legislative rules of both the United States House of Representatives and the United States Senate

(14) Attributing to the Hyde Amendment a substantive impact on state obligations under Title XIX encourages the kind of judicial legislating engaged in recently by several courts which essentially redrafted state statutes to parallel the provisions of the Hyde Amendment. See, e.g., Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, 99 S.Ct. 2181 (1979).

dictate a construction of the Hyde Amendment that avoids a substantive repeal. The House Rule states directly that it is not "in order" for "any provision in any appropriations bill or amendment thereto" to change "an existing law." To the same effect is the Senate Rule, which provides that "[n]o amendment which proposes general legislation shall be received to any general appropriations bill . . . ."[15] These

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(15) House Rule XXI (2) provides in full:

> No appropriations shall be reported in any general appropriations bill, or by an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress, nor shall any provision in any such bill or amendment thereto changing an existing law be in order.

Senate Rule 16.4 provides in full:

> No amendment which proposes general legislation shall be received to any general appropriations bill, nor shall any amendment not germane as relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of funds appropriated which proposes a limitation

explicit rules may, of course, be deliberately waived by either House in particular circumstances. No such waiver, however, occurred in connection with the passage of the Hyde Amendment.[16]

In fact, Rep. Hyde, the sponsor of the Amendment and one of its staunchest supporters apologized for attaching it to an appropriations bill:

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> not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriations bill may be laid on the table without prejudice to the bill.

(16) Senator Goldwater raised a point of order, on the grounds of germaneness and whether the proposed amendment would constitute legislation on an appropriations bill. Upon questioning he limited his request to the question of germaneness and the Senate voted that it was germane. The Senate never waived the rule prohibiting legislating on an appropriations bill. 123 Cong. Rec. S.11055 June 29, 1977; See also, Zbaraz, 596 F.2d n. 13, (1979) where the court expressly declined to rely on any waiver of the rules of Congress.

> Yesterday remarks were made that it is unfortunate to burden an appropriations bill with complex issues, such as busing, abortion, and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill.

123 Cong. Rec. H6083 (daily ed. June 17, 1977).

Although Rep. Hyde would have preferred to enact substantive legislation, he was well aware that the legislation he was proposing only affected federal funding of abortions. As he stated during the 1976 debates, the rider was "intended . . . to prevent the use of Federal funds to pay for abortions . . ." 122 Cong. Rec. H10314 (1976).

In T.V.A. v. Hill, the Court explicitly cautioned, in a similar context, against adopting a substantive interpretation of an appropriations bill that would "flout the very rules that Congress carefully adopted . . . ." 437 U.S. at 190.

As Judge Bownes correctly observed in his dissent in Preterm, Inc. v. Dukakis, 591 F.2d 121, 138 (1st Cir. 1979), cert. denied, 99 S.Ct. 2181 (1979):

> Are we to assume that Congress deliberately evaded and ignored its own procedural rules, or forgot about them, or was entirely ignorant of them? The only logical conclusion that gives due deference to Congress' knowledge and respect for its own procedural requirements is that the Hyde Amendment was limited to the use of federal funds only.

At the very least, the debates do not show a purpose to repeal with that great degree of clarity that would be necessary to justify this Court's ignoring plain statutory language and the explicit rules of both Houses of Congress. (17)

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(17) In this regard see the introductory language to the HEW regulations implementing the Hyde Amendment. 43 Fed. Reg. 4833. HEW noted that the Congressional debates were "at times inconsistent or inconclusive." In general, it failed to find any clear "official expression of even one House of Congress as to the meaning of this statute." The HEW regulations, as noted below, went on to implement the Amendment solely as a limit on federal funding.

Appellants rely primarily on statements made by opponents of the Amendment, who were arguing to defeat its passage.[18] See, e.g, Intervenor's Brief at 57. Opponents' statements are generally and properly recognized as the least reliable source of legislative history regarding the purpose or effect of legislation. As noted by the Second Circuit "the United States Supreme Court has, of course, often cautioned against the danger of reliance upon the views of a bill's opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." United States v. Oates, 560 F.2d 45, 71, n. 27, (2d Cir. 1977),

(18) Appellants rely on several statements by proponents of the Hyde Amendment. See Intervenors' Brief at 96-99; State's Brief at 59-60. These statements apparently assume that the states will have a choice whether to fund abortion. The statements, however demonstrate confusion and misunderstanding of the states' obligation under Title XIX with respect to medically necessary services, including abortions. The remarks are also ambiguous. They may mean to refer to abortions that are not medically necessary and that are therefore not covered by Title XIX.

quoting from N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen Local 760, 377 U.S. 58, 66 (1964). See also, the Supreme Court's plain direction in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, (1951). "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-5.

The Solicitor General's contention in this case is directly in conflict with the position expressed in an earlier memorandum. In the case of Buckley v. McRae, appeal dismissed, 433 U.S. 916 (1977), the Solicotor General argued that the substantive "rights to obtain or perform an abortion were not and could not have been restricted by the enactment of the Hyde Amendment," since "it is clear that, under the Medicaid program, the states' duty to fund medical procedures covered by by their plans is wholly independent of their right to

subsequent federal reimbursement." Memorandum in Opposition to Stay Pending Appeal at 6.

D. The legislative history of the Hyde Amendment does not demonstrate an intention to repeal existing state obligations under the Social Security Act.'

The debates leading up to the enactment of the various Hyde Amendments, taken as a whole, support the proposition that the proponents of the Amendment intended only to limit the use of federal funds rather than to repeal portions of Title XIX of the Social Security Act.(19) Nowhere in the debates does any Congressman manifest an intention to change the substantive provisions of Title XIX regarding the states' duty to provide medically necessary services, including abortions. The burden of course, lies with apellants to show that the legislative history unambiguously contradicts the

(19) See Zbaraz Brief at _____ for an exhaustive account of the congressional debates on the Hyde Amendment.

clear statutory language.

In looking to statements made by the sponsors of the Hyde Amendment, there is no indication of a purpose to repeal Title XIX obligations. Consider Congressman Hyde's summation of his position: "The position is that no federal funds go to pay for abortions." 123 Cong. Rec. H10830 (daily October 12, 1977) (emphasis added). Indeed, Congressman Hyde expressed his frustration that his attempts to engage Congress in more substantive revision of abortion rights had failed and that a limitation on federal appropriations was his only remaining avenue. See p. 6, supra. Congressman Edwards, another supporter of the Amendment, noted that "the only thing that we can address ourselves to in this body, and the only thing that we have any control over is what we do with federal dollars." Id. at 6090 (daily ed. June 17, 1977) (emphasis added). On the same day Congressman Dornan, also a

supporter of the Amendment noted that it does not violate any substantive privacy rights, but "simply denies federal funds for the realization of a personal subjective decision and judgment." Id. at H6086 (emphasis added). These directly relevant remarks at the beginning of the debate by proponents of the Amendment were never challenged, withdrawn or refuted. Given "the absence of any statement during the course of the lengthy debate that the Hyde Amendment was making a significant change in the Medicaid Act," Preterm v. Dukakis, 121 F.2d at 136 (Bownes, J. dissenting), these explicit assertions that restrictions on federal funds alone were the purpose of the legislation adequately refute appellants' contention that the legislative history shows an unambiguous intention to amend Title XIX.

E. THE PRESUMPTION AGAINST AN EXPANSIVE IMPLIED CONSTRUCTION OF AN APPROPRIATIONS STATUTE IS JUSTIFIED BY BASIC PRINCIPLES OF THE SEPARATION OF POWERS.

Appellants urge the Court to infer that Congress intended the Hyde Amendment to eliminate the states' obligation to fund Medicaid abortions even though Congress did not say so because such was the "common understanding" among Congressmen. See U.S. Brief at ___. A similar argument was urged upon the Court and rejected in T.V.A. v. Hill, even though it resulted in the costly abandonment of a nearly completed federal dam:

> [W]e are urged to view the Endangered Species Act 'reasonably' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.' But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt Congressional action by judicially decreeing what accords

> with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

437 U.S. 153, 194 (1978).

Even if interpreting the Hyde Amendment as merely a restriction on federal spending seems unwise or inequitable to some because it leaves the states to foot the Medicaid bill for therapeutic abortions, certainly it is not this Court's role to expand the impact of the Hyde Amendment beyond the clear intention of Congress. As noted by the district court in Planned Parenthood Affiliates of Ohio v. Rhodes:

> The fact that some may view the added burden created by the Hyde Amendment upon the states as "anomalous' or "inequitable' is, of course, beyond the scope of proper inquiry for this Court. It is quite possible that the proponents of the amendment were unaware of its ramifications in light of Title XIX. It is not for this Court to attempt to improve upon what Congress had done because a litigant maintains that more would have been done if a certain problem were foreseen. The solution lies with Congress.

477 F. Supp. 529, 539 (S.D. Ohio 1979) (emphasis added).

The Congressmen speaking on the Amendment were perhaps unfamiliar with the complicated provisions of the Medicaid statute governing the administration of state plans and were not aware that states participating in Medicaid are required to fund medically necessary abortions.

In T.V.A. v. Hill, the Court expressly declined to make the vague "understanding" of the appropriations committee that "the earlier legislation would not prohibit the proposed expenditure" into the law by redrafting the statute. 437 U.S. at 191. Although several Congressmen while debating the Hyde Amendment evidenced a desire to halt all public financing of abortion, we fail to see why their views should be attributed to Congress as a whole in contravention of the clear language of the Amendment itself. In fact, Justice McManus, dissenting in the recent case of Hodgson v. Board of County Commissioners, criticized the majority for judicially redrafting the language

of the Hyde Amendment to work a substantial alteration on Title XIX:

> If Congress intends that neither the federal nor state governments fund medically necessary abortions, it knows full well how to make its intent clear and manifest by forthrightly amending Medicaid directly. To permit Congress to do less is tantamount to having courts legislate, by judicial interjection under the guise of construction, what Congress has been unable or unwilling to do by clear and manifest enactment.

slip op. at 27 (8th Cir. 1979). He viewed the majority's conclusion that the Hyde Amendment substantively amended Medicaid as nothing less than an "abdication [by the courts] of their proper role in our tri-partite system of government." Id. at 28.

F. THE INTERPRETATIVE REGULATIONS OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE — THE FEDERAL AGENCY CHARGED WITH ADMINISTRATION OF THE HYDE AMENDMENT — DO NOT CONSTRUE THE AMENDMENT TO REPEAL TITLE XIX OBLIGATIONS.

The last paragraph of the 1978 Hyde Amendment requires that the Secretary of HEW "promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced." Such regulations were originally issued on February 3, 1978, 43 Fed. Reg. 4833, two months after enactment of the Hyde Amendment. Amended regulations were issued on July 21, 1978, 43 Fed. Reg. 31868; 42 C.F.R. §§ 50.301-50.310 (1978).

Interpretative regulations promulgated by the federal agency charged with the administration of a federal statute are entitled to substantial respect. See, e.g., Griggs v. Duke Power Co., 401 U.S. 433 (1970); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970); United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965).

This respect is especially due when, as here, "the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

Prior to the enactment of the Hyde Amendment, HEW had issued detailed regulations implementing Title XIX of the Social Security Act. See 42 C.F.R. § 440.230 (1978). These regulations reflect and incorporate the funding obligations that Title XIX places upon states that participate in the Medicaid program. See, e.g., 42 C.F.R. § 440.230(a), (b) and (c). The specific HEW Hyde Amendment regulations, however, which were adopted in light of these prior general regulations, regulate only the expenditure of federal funds — no mention whatever is made of state expenditures or the fulfillment of state obligations

under Title XIX. Thus, the introduction to the original Hyde Amendment regulations states that they are designed to specify "when federal funds may be used to pay for abortions." 43 Fed. Reg. 4833 (Feb. 3, 1978). The regulations themselves describe as the general rule of the Hyde Amendment that "federal financial participation is not available for the performance of an abortion except under circumstances described . . . ." 42 C.F.R. § 50.303 (emphasis added). Specific provisions of the regulations are addressed only to the question of when "federal financial participation is available." 42 C.F.R. §§ 50.304, 50.305, 50.306, 50.307, 50.308. The omission from the HEW regulations of any reference to a modification of state obligations is particularly significant in view of the direction in the Hyde Amendment that the Department's regulations ensure that all of the Amendment's new provisions be "rigorously enforced."

In response to a comment on the original HEW Hyde Amendment regulations, HEW responded by explaining that:

> These regulations only govern the instances where Federal funding is available for abortions and other medical procedures. They do not deal with the separate question of circumstances under which a State must fund abortions under the medicaid program. 43 Fed. Reg. 31875 (July 21, 1978).

In short, HEW plainly has not deemed the Hyde Amendment to be a partial repeal of Title XIX.

IV. VIEWED PURELY AS A FEDERAL APPROPRIATIONS MEASURE THE HYDE AMENDMENT DOES NOT ALTER ILLNOIS' OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT.

As shown in Part II of this brief, Title XIX of the Social Security Act and its implementing requlations require states participating in Medicaid to fund medically necessary abortions. The substantive requirements of Title XIX with respect to state abortion funding were in no way altered by the Hyde Amendment which withdrew the partial federal reimbursement previously available to the states for Medicaid abortions. The Solicitor General on behalf of the United States argues that even when construed simply as a federal appropriations act, the Hyde Amendment automatically eliminated the Title XIX requirement that the states fund therapeutic abortions.

The Solicitor General attempts to sidestep the issue of whether the Hyde Amendment is an implied alteration of the substantive provisions of Title XIX

through a novel interpretation of the Medicaid funding scheme.[20] He contends that the states are not compelled to fund any medical service for which they do not receive partial federal reimbursement and therefore, the states' obligation to fund medically necessary abortions for which they could not receive matching federal funds automatically ceased when the Hyde Amendment was passed. See U.S. Brief at ____.

This contention, however, is inconsistent with the history of the Social Security program. Since its enactment there have been numerous occasions in which the states have come under specific funding obligations

(20) We note that the Solicitor General declines to adopt the view of the courts of appeals which have held that Hyde substantively amended Title XIX. See U.S. Brief at _____.

without any right to matching federal funds.[21]

(21) For example, when the Supplemental Security Income (SSI) program was enacted in 1973 to replace the previous programs of aid to the aged, blind or disabled, the federal statute required that the states, as a condition of participation in Medicaid, supplement the monthly SSI payments to persons who were receiving assistance as of December 1973, in order to avoid reductions in grants. This mandatory supplement was to be funded entirely by the states. See Public Law 93-66, § 212, 93d Cong., 1st Sess. (1973), 42 U.S.C. § 1381 et. seq. (Supp. 1973). This requirement has been enforced by federal courts, see, e.g., Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974). Similarly, where states had previously elected to provide Medicaid to certain groups of people, entirely at state expense, the federal statute prohibited states from terminating Medicaid eligibility. See Lewis v. Shulimson, 400 F. Supp. 807. (E.D. Mo. 1975).

See also, Justice Douglas' dissent in Dandridge v. Williams, 397 U.S. 471 (1970), discussing statutory changes in the AFDC program. Mr. Justice Douglas quotes Representative Mills as saying that the new limits on federal funding would have no effect on the obligations theretofore placed on the states.

Other provisions of the Social Security Act also specify circumstances under which the states

The basic scheme of Medicaid easily accommodates the requirement of state funding for a particular service for which no federal reimbursement is available. Federal financial participation in Medicaid is not computed on an item for item basis but as a percentage of the total state expenditure. See 42 U.S.C. §1396d(b). As the district court in Doe v. Matthews concludes:

> The Hyde Amendment appears to be simply a limitation on the federal government's undertaking under Title XIX to reimburse jurisdictions participating in the Medicaid program . . . A state then may have assumed the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater share of the cost of the program than it might have originally anticipated.

Footnote (21) con't

are required to expend funds which are not matched by federal participation. See, e.g., 42 U.S.C. 1396a(a)(2), providing that the states must ensure adequate payments despite a lack of local contributions; 42 U.S.C. 1396a(a)(18), prohibiting state liens on the property of recipients of medical assistance or adjustment or recovery of benefits; 42 U.S.C. 1396a(c), providing that state plans, that result in a reduction of money payments will not be approved; 42 U.S.C. 1396b(g), providing for a reduction in the federal percentage contributed to medical assistance where the state does not have an effective program of control over expenditures; and 42 U.S.C. 603(g), providing for a reduction in the amount of reimbursement by the federal government to the states in certain circumstances.

422 F. Supp. 141, 143 (D.D.C. 1976); accord, Doe v. Matthews, 420 F. Supp. 865 (D.N.J. 1976).

Similarly, the district court in Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979), noting initially that state participation in Medicaid is voluntary, cautioned that "the basic policy of Title XIX, the enabling of each state to furnish medical assistance to the needy" should not be confused "with the basic mechanism by which Congress seeks to effect that policy, the provision of federal funds on a cooperating basis with participating states." Id. at 1333. The court noted further that:

> [It] is not the case, nor is it required by Title XIX, that there be federal financial participation in ever service necessarily provided by a participating state. Indeed, in the instant case it has been stipulated that the State of Georgia provides 100% of the premiums for the insurance program established by Part B of Title XVIII, 42 U.S.C. 1395, et. seq., on behalf of persons simultaneously covered by Medicare and Medicaid. See 42 U.S.C. 1396b(b)(1). Id.

The district court in Planned Parenthood Affiliates of Ohio v. Rhodes reached the same conclusion:

> This Court cannot agree that exclusive state funding of medically necessary abortions is at all at variance with the "basic policy" of the Medicaid system. The "basic policy" of Title XIX, embodied in § 1396, is to provide medical assistance and rehabilitation services for certain individuals. There is no intrinsic value in the federal-state cooperation involved in Title XIX, except as a means to this end. Section 1496 does not foreclose, even by intimation, the possibility that a state might be required to fund exclusively one or more services in order to receive the federal appropriations authorized by § 1396.

477 F. Supp. 529, 538.

CONCLUSION

For the reasons set forth above, Amici respectfully request your Honorable Court to affirm the judgment of the Western District of Illinois either upon the grounds advanced therein or upon the alternative statutory grounds urged in the foregoing brief.

Respectfully submitted,

PAUL BENDER
THOMAS B. HARVEY
American Civil Liberties Foundation
260 South 15th Street, 6th Floor
Philadelphia, PA 19102

SUSAN CARY NICHOLAS
KATHRYN KOLBERT
Women's Law Project
112 South 16th Street, Suite 1012
Philadelphia, PA 19102

SHERI B. FRIEDMAN
ROLAND MORRIS
100 South Broad Street, 16th Floor
Philadelphia, PA 19102

Attorneys for Amici Curiae*